

SENATE COMMITTEE SUBSTITUTE

FOR

SENATE BILL NO. 758

AN ACT

To repeal sections 8.250, 8.260, 34.055, 34.057, 34.058, 34.100, 34.203, 34.206, 34.209, 34.212, 34.217, and 34.218, RSMo, and to enact in lieu thereof thirteen new sections relating to bidding procedures for certain public projects for facilities.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 8.250, 8.260, 34.055, 34.057, 34.058, 34.100, 34.203, 34.206, 34.209, 34.212, 34.217, and 34.218, RSMo, are repealed and thirteen new sections enacted in lieu thereof, to be known as sections 8.250, 8.260, 8.690, 8.960, 8.962, 8.964, 8.966, 8.968, 8.970, 8.972, 8.974, 34.055, and 34.100, to read as follows:

8.250. 1. "Project" for the purposes of this chapter means the labor or material necessary for the construction, renovation, or repair of improvements to real property so that the work, when complete, shall be ready for service for its intended purpose and shall require no other work to be a completed system or component.

2. All contracts for projects, the cost of which exceeds twenty-five thousand dollars, entered into by any city containing five hundred thousand inhabitants or more shall be let to the lowest, responsive, responsible bidder or bidders after notice and publication of an advertisement for five days in a daily newspaper in the county where the work is located, or at least twice over a period of ten days or more in a newspaper in the county where the work is located, and in two daily newspapers in the state which do not have less than fifty thousand daily circulation, and by

such other means as are determined to be most likely to reach potential bidders.

3. All contracts for projects, the cost of which exceeds one hundred thousand dollars, entered into by an officer or agency of this state shall be let to the lowest, responsive, responsible bidder or bidders based on preestablished criteria after [notice and] publication of an [advertisement] invitation to bid for [five days in a daily newspaper in the county where the work is located, or at least twice over] a period of ten days or more in a newspaper in the county where the work is located [and], in one daily newspaper in the state which does not have less than fifty thousand daily circulation, and [by such other means as determined to be most likely to reach potential bidders] on the website of the officer or agency or through an electronic procurement system. For all contracts for projects between twenty-five thousand dollars and one hundred thousand dollars, a minimum of three contractors shall be solicited with the award being made to the lowest responsive, responsible bidder based on preestablished criteria.

4. The number of such public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which the bids are requested or solicited unless debarred for cause. No contract shall be awarded when the amount appropriated for same is not sufficient to complete the work ready for service.

5. Dividing a project into component labor or material allocations for the purpose of avoiding bidding or advertising provisions required by this section is specifically prohibited.

8.260. All appropriations made by the general assembly amounting to one hundred thousand dollars or more for the

construction, renovation, or repair of facilities shall be expended in the following manner:

(1) The agency requesting payment shall provide the commissioner of administration with satisfactory evidence that a bona fide contract, procured in accordance with all applicable procedures, exists for the work for which payment is requested;

(2) All requests for payment shall be approved by the architect or engineer registered to practice in the state of Missouri who designed the project or who has been assigned to oversee it;

(3) In order to guarantee completion of the contract, the agency or officer shall retain a portion of the contract value in accordance with the provisions of section **[34.057]** 8.960;

(4) A contractor may be paid for materials delivered to the site or to a storage facility approved by the director of the division of facilities management, design and construction as having adequate safeguards against loss, theft or conversion.

In no case shall the amount contracted for exceed the amount appropriated by the general assembly for the purpose.

8.690. Any public owner, as defined in section 8.675, shall have the authority to utilize the construction manager-at-risk delivery method, as provided for in section 67.5050, or the design-build delivery method, as provided for in section 67.5060, except that such public owner shall:

(1) In addition to the authority granted under paragraph (b) of subdivision (3) of subsection 1 of section 67.5060, to use the design-build method for noncivil projects in excess of seven million dollars, also have the authority to use such design-build delivery method for

noncivil works projects valued at less than one million dollars; and

(2) Not be subject to subsection 15 of section 67.5050 and subsection 22 of section 67.5060.

[34.057.] 8.960. 1. Unless contrary to any federal funding requirements or unless funds from a state grant are not timely received by the contracting public municipality but notwithstanding any other law to the contrary, all public works contracts made and awarded by the appropriate officer, board or agency of the state or of a political subdivision of the state or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction or alteration of any public works project, shall provide for prompt payment by the public owner to the contractor, and any professional engineer, architect, landscape architect, or land surveyor, as well as prompt payment by the contractor to the subcontractor and material supplier in accordance with the following:

(1) A public owner shall make progress payments to the contractor and any professional engineer, architect, landscape architect, or land surveyor on at least a monthly basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as determined by the project architect or engineer. Retainage withheld on any construction contract or subcontract for public works projects shall not exceed five percent of the value of the contract or subcontract. If the contractor is not required to obtain a bond under section 107.170 because the cost of the public works contract is not estimated to exceed fifty thousand

dollars, the public owner may withhold retainage on the public works project in an amount not to exceed ten percent of the value of the contract or subcontract. The public owner shall pay the contractor the amount due, less a retainage, within thirty days following the latter of the following:

(a) The date of delivery of materials or construction services purchased;

(b) The date, as designated by the public owner, upon which the invoice is duly delivered to the person or place designated by the public owner; or

(c) In those instances in which the contractor approves the public owner's estimate, the date upon which such notice of approval is duly delivered to the person or place designated by the public owner;

(2) Payments shall be considered received within the context of this section when they are duly posted with the United States Postal Service or other agreed upon delivery service or when they are hand-delivered to an authorized person or place as agreed to by the contracting parties;

(3) If, in the discretion of the owner and the project architect or engineer and the contractor, it is determined that a subcontractor's performance has been completed and the subcontractor can be released prior to substantial completion of the public works contract without risk to the public owner, the contractor shall request such adjustment in retainage, if any, from the public owner as necessary to enable the contractor to pay the subcontractor in full. The public owner may reduce or eliminate retainage on any contract payment if, in the public owner's opinion, the work is proceeding satisfactorily. If retainage is released and there are any remaining minor items to be completed, an amount equal to one hundred fifty percent of the value of

each item as determined by the public owner's duly authorized representatives shall be withheld until such item or items are completed;

(4) The public owner shall pay at least ninety-eight percent of the retainage, less any offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor. The contractor shall pay the subcontractor or supplier after substantial completion of the contract work and acceptance by the public owner's authorized contract representative, or as may otherwise be provided by the contract specifications for state highway, road or bridge projects administered by the state highways and transportation commission. Such payment shall be made within thirty days after acceptance, and the invoice and all other appropriate documentation and certifications in complete and acceptable form are provided, as may be required by the contract documents. If the public owner or the owner's representative determines the work is not substantially completed and accepted, then the owner or the owner's representative shall provide a written explanation of why the work is not considered substantially completed and accepted within fourteen calendar days to the contractor, who shall then provide such notice to the subcontractor or suppliers responsible for such work. If such written explanation is not given by the public body, the public body shall pay at least ninety-eight percent of the retainage within thirty calendar days. If at that time there are any remaining minor items to be completed, an amount equal to one hundred fifty percent of the value of each item as determined by the public owner's representative shall be withheld until such items are completed;

(5) All estimates or invoices for supplies and services purchased, approved and processed, or final

payments, shall be paid promptly and shall be subject to late payment charges provided in this section. Except as provided in subsection 4 of this section, if the contractor has not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the contracting agency shall pay the contractor, in addition to the payment due him, interest at the rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid;

(6) When a contractor receives any payment, the contractor shall pay each subcontractor and material supplier in proportion to the work completed by each subcontractor and material supplier his application less any retention not to exceed five percent. If the contractor receives less than the full payment due under the public construction contract, the contractor shall be obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount of payment. When, however, the public owner does not release the full payment due under the contract because there are specific areas of work or materials he is rejecting or because he has otherwise determined such areas are not suitable for payment then those specific subcontractors or suppliers involved shall not be paid for that portion of the work rejected or deemed not suitable for payment; provided the public owner or the owner's representative gives a written explanation to the contractor, subcontractor, or supplier involved as to why the work or supplies were rejected or deemed not suitable for payment, and all other subcontractors and suppliers shall be paid in full;

(7) If the contractor, without reasonable cause, fails to make any payment to his subcontractors and material

suppliers within fifteen days after receipt of payment under the public construction contract, the contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, interest in the amount of one and one-half percent per month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision shall also apply to any payments made by subcontractors and material suppliers to their subcontractors and material suppliers and to all payments made to lower tier subcontractors and material suppliers throughout the contracting chain;

(8) The public owner shall make final payment of all moneys owed to the contractor, including any retainage withheld under subdivision (4) of this subsection, less any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty days of the due date. Final payment shall be considered due upon the earliest of the following events:

(a) Completion of the project and filing with the owner of all required documentation and certifications, in complete and acceptable form, in accordance with the terms and conditions of the contract;

(b) The project is certified by the architect or engineer authorized to make such certification on behalf of the owner as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form; or

(c) The project is certified by the contracting authority as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form.

2. Nothing in this section shall prevent the contractor or subcontractor, at the time of application or

certification to the public owner or contractor, from withholding such applications or certifications to the owner or contractor for payment to the subcontractor or material supplier. Amounts intended to be withheld shall not be included in such applications or certifications to the public owner or contractor. Reasons for withholding such applications or certifications shall include, but not be limited to, the following: unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with other material provisions of the contract; third-party claims filed or reasonable evidence that a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment and materials; damage to a contractor or another subcontractor or material supplier; reasonable evidence that the contract cannot be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to exceed the initial percentage retained by the owner.

3. Should the contractor determine, after application or certification has been made and after payment has been received from the public owner, or after payment has been received by a contractor based upon the public owner's estimate of materials in place and work performed as provided by contract, that all or a portion of the moneys needs to be withheld from a specific subcontractor or material supplier for any of the reasons enumerated in this section, and such moneys are withheld from such subcontractor or material supplier, then such undistributed amounts shall be specifically identified in writing and deducted from the next application or certification made to the public owner or from the next estimate by the public owner of payment due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved in

accordance with the terms of the contract documents. Upon such resolution the amounts withheld by the contractor from the subcontractor or material supplier shall be included in the next application or certification made to the public owner or the next estimate by the public owner and shall be paid promptly in accordance with the provisions of this section. This subsection shall also apply to applications or certifications made by subcontractors or material suppliers to the contractor and throughout the various tiers of the contracting chain.

4. The contracts which provide for payments to the contractor based upon the public owner's estimate of materials in place and work performed rather than applications or certifications submitted by the contractor, the public owner shall pay the contractor within thirty days following the date upon which the estimate is required by contract to be completed by the public owner, the amount due less a retainage not to exceed five percent. All such estimates by the public owner shall be paid promptly and shall be subject to late payment charges as provided in this subsection. After the thirtieth day following the date upon which the estimate is required by contract to be completed by the public owner, the contracting agency shall pay the contractor, in addition to the payment due him, interest at a rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

5. The public owner shall pay or cause to be paid to any professional engineer, architect, landscape architect, or land surveyor the amount due within thirty days following the receipt of an invoice prepared and submitted in accordance with the contract terms. In addition to the payment due, the contracting agency shall pay interest at the rate of one and one-half percent per month calculated

from the expiration of the thirty-day period until fully paid.

6. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor, or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but not be limited to, the following: liquidated damages; unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with any material provision of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure to make timely payments for labor, equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or citation by the enforcing authority for acts of the contractor or subcontractor which do not comply with any material provision of the contract and which result in a violation of any federal, state or local law, regulation or ordinance applicable to that project causing additional costs or damages to the owner.

7. Nothing in this section shall be construed to require direct payment by a public owner to a subcontractor or supplier, except in the case of the default, as determined by a court, of the contractor on the contract with the public owner where no performance or payment bond is required or where the surety fails to execute its duties, as determined by a court.

8. Notwithstanding any other provisions in this section to the contrary, no late payment interest shall be due and owing for payments which are withheld in good faith

for reasonable cause pursuant to subsections 2, 5, and 6 of this section. If it is determined by a court of competent jurisdiction that a payment which was withheld pursuant to subsections 2, 5, and 6 of this section was not withheld in good faith for reasonable cause, the court may impose interest at the rate of one and one-half percent per month calculated from the date of the invoice and may, in its discretion, award reasonable attorney fees to the prevailing party. In any civil action or part of a civil action brought pursuant to this section, if a court determines after a hearing for such purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any proceeding therein was done frivolously and in bad faith, the court shall require the party who initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be had to pay the other party named in such action the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney fees.

[34.058.] 8.962. 1. As used in this section, the term "public works contract" means a contract of the state, county, city and other political subdivisions of the state, except the Missouri transportation department, for the construction, alteration, repair, or maintenance of any building, structure, highway, bridge, viaduct, pipeline, public works, or any other works dealing with construction, which shall include, but need not be limited to, moving, demolition, or excavation performed in conjunction with such work.

2. Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages, or obtain an equitable adjustment, for delays in performing such contract, if such

delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.

3. Subsection 2 of this section is not intended to render void any contract provision of a public works contract that:

(1) Precludes a contractor from recovering that portion of delay costs caused by the acts or omissions of the contractor or its agents;

(2) Requires notice of any delay by the party responsible for such delay;

(3) Provides for reasonable liquidated damages; or

(4) Provides for arbitration or any other procedure designed to settle contract disputes.

[34.203.] 8.964. The provisions of sections [34.203 to 34.216] 8.964 to 8.974 shall be known and may be cited as the "Fairness in Public Construction Act".

[34.206.] 8.966. The purpose of sections [34.203 to 34.216*] 8.964 to 8.974 is to fulfill the state's proprietary objectives in maintaining and promoting the economical, nondiscriminatory, and efficient expenditures of public funds in connection with publicly funded or assisted construction projects. Nothing in sections [34.203 to 34.216*] 8.964 to 8.974 shall prohibit employers or other parties covered by the National Labor Relations Act from entering into agreements or engaging in any other activity arguably protected by law, nor shall any aspect of sections [34.203 to 34.216*] 8.964 to 8.974 be interpreted in such a way as to interfere with the labor relations of parties covered by the National Labor Relations Act.

[34.209.] 8.968. 1. The state, any agency of the state, any political subdivision of the state, or any

instrumentality thereof, when engaged in procuring or letting contracts for construction, repair, remodeling, or demolition of a facility shall ensure that bid specification, project agreements, and other controlling documents entered into, required, or subject to approval by the state, agency, political subdivision, or instrumentality do not:

(1) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or related projects; or

(2) Discriminate against, encourage, or give preferential treatment to bidders, offerors, contractors, or subcontractors for:

(a) Entering or refusing to enter agreements with one or more labor organizations on the same or related construction projects; or

(b) Remaining or refusing to remain signatory with one or more labor organizations on the same or related construction projects.

2. Nothing in this section shall be construed to prohibit the state, any agency of the state, any political subdivision of the state, or any instrumentality thereof from requiring bidders, offerors, contractors, or subcontractors, as a condition of receiving work or submitting a bid, to test its workers and employees for the presence of illegal drugs.

[34.212.] 8.970. 1. The state, any agency of the state, any political subdivision of the state, or any instrumentality thereof shall not issue or award grants, tax abatements, or tax credits or enter into cooperative agreements for construction projects or for the improvement, maintenance, or renovation of real property or fixtures, a

condition of which requires that bid specifications, project agreements, or other controlling documents pertaining to the grant, tax abatement, tax credit, or cooperative agreement contain any of the elements specified in section [34.209] 8.968.

2. The state, any agency of the state, any political subdivision, or any instrumentality thereof shall exercise such authority as may be required to preclude a grant, tax abatement, or tax credit recipient or party to a cooperative agreement from imposing any of the elements specified in section [34.209] 8.968 in connection with any grant or cooperative agreement awarded or entered into. Nothing in sections [34.203 to 34.217] 8.964 to 8.974 shall prohibit contractors or subcontractors from voluntarily entering into agreements described in section [34.209] 8.968.

[34.217.] 8.972. Notwithstanding the provisions of section 1.140, the provisions of sections 290.095 and 290.250 and sections [34.203 to 34.216*] 8.964 to 8.974 shall not be severable. In the event a court of competent jurisdiction rules that any part of this act is unenforceable, the entire act shall be rendered null and void.

[34.218.] 8.974. 1. Any entity which violates the provisions of sections [34.203 to 34.217] 8.964 to 8.974 shall be liable to the person affected for such equitable relief as may be appropriate, including reasonable attorney's fees.

2. Any entity which violates the provisions of sections [34.203 to 34.217] 8.964 to 8.974 shall not be eligible for any state funding or tax credits issued by the state for two years.

3. The prosecuting attorney or circuit attorney with jurisdiction over the location where a violation of sections

[34.203 to 34.217] 8.964 to 8.974 occurs, or the attorney general of this state, shall investigate complaints of violation of such sections, and use all means at their command to ensure the effective enforcement of this section.

34.055. 1. Except as otherwise provided in section [34.057] 8.960, all invoices for supplies and services purchased by the state, duly approved and processed, shall be subject to interest charges or late payment charges as provided in this section.

2. After the forty-fifth day following the later of the date of delivery of the supplies and services or the date upon which the invoice is duly approved and processed, interest retroactive to the thirtieth day shall be paid on any unpaid balance, except balances for services provided by a gas corporation, electrical corporation, water corporation, or sewer corporation which has received authorization from the public service commission to impose late payment charges on delinquent utility bills, upon application of the vendor thereof. The rate of such interest shall be three percentage points above the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System.

3. The state shall be liable for late payment charges on any delinquent bill for services purchased by the state from a gas corporation, electrical corporation, water corporation, or sewer corporation which has received authorization from the public service commission to impose late payment charges on delinquent utility bills. The rate of such late payment charges shall be as established for each such corporation by order of the public service commission, but bills rendered to the state shall not be

considered delinquent until thirty days after rendition of the bill by the corporation.

4. Any such interest charges or late payment charges shall be paid from appropriations which were made for the fiscal year in which the supplies or services were delivered to the respective departments purchasing such supplies or services. The commissioner of administration shall be responsible for the timely implementation of this section and all officers, departments, institutions and agencies of state government shall fully cooperate with the commissioner of administration in the implementation of this section. No late payment penalty shall be assessed against, nor payable by, the state unless pursuant to the provisions of this section.

5. Notwithstanding any other provision of this section, recipients of funds from the low-income energy assistance program shall be exempt from interest charges imposed by such section for the duration of the recipient's participation in the program.

34.100. The commissioner of administration may, when in the commissioner's best judgment it is in the best interests of the state, delegate the commissioner's procurement authority pursuant to this chapter to an individual department; provided, however, that each instance of single feasible source purchasing authority in excess of **[five]** ten thousand dollars under section 34.044 must be specifically delegated by the commissioner. The delegation may allow departments to negotiate in accordance with section 34.042 the purchase of services for patients, residents or clients with funds appropriated for this purpose. In accepting this delegated authority the department acknowledges its ability to, and agrees to, fulfill all of the requirements of this chapter in making

purchases and entering into contracts and keeping records. No claim for payment based upon any purchase under this section shall be certified by the commissioner unless accompanied by such documentation of compliance with the provisions of this chapter as the commissioner may require. Any department that fails to fulfill all such requirements may have its delegated authority rescinded by the commissioner of administration.